

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A. NO.708 of 2004

DATE OF DECISION: 28.08.2006.

Darshan Singh

...Appellant.

Versus

Darbara Singh

...Respondent.

CORAM: HON'BLE MR. JUSTICE MAHESH GROVER.

PRESENT: Sh.R.K.Handa, Advocate,
for the appellant.

Sh.G.S.Sandhawalia, Advocate,
for the respondent.

MAHESH GROVER, J.

The defendant is in appeal assailing the judgment and decree dated 01.02.2001 passed by the learned trial Court and judgment and decree dated 22.12.2003 passed by the learned lower Appellate Court affirming the findings of the learned Trial Court.

Briefly stated the facts of the case are that the plaintiff-respondent Darbara Singh filed a suit for possession by way of specific performance of an agreement of sale dated 06.04.1996 of land measuring 17 Kanals 13 marlas. In the alternative, a prayer was made for a suit for recovery of Rs.3,40,000/- and it was also prayed that the appellant may be restrained from alienating the suit land. It was contended by the plaintiff-respondent that an agreement to sell had been executed by the defendant-appellant in his favour on 06.04.1996 according to which the sale consideration of the land was fixed @ Rs.1,60,000/- per acre and in pursuance to this agreement Rs.1,70,000/- was paid as earnest money.

The date of the execution of the sale deed was fixed as 10.07.1996 on which date the remaining consideration was also to be paid. On 10.07.1996, i.e. the stipulated date, the plaintiff-respondent had presented himself in the office of Sub-Registrar and remained there from 9.00 a.m. to 4.00 p.m. but the appellant did not turn up to perform his part of the agreement. A notice was served upon the appellant which was not received by him intentionally and, therefore, it is in the backdrop of these facts that the suit was filed by the plaintiff-respondent.

The appellant appeared and stated that the agreement was a sham transaction and the land, in question, was ancestral and in fact he had no right to sell it. He contended that he has never entered into the agreement with the plaintiff-respondent and stated that there were money transactions between the parties and that the respondent used to get the signatures on blank stamp papers and one such blank paper has been misused to execute the agreement to sell.

On the pleadings of the parties, the following issues were framed:-

- “1) Whether the defendant had executed agreement of sale dated 06.04.1996 to sell the suit land to the plaintiff at the rate of Rs.1,60,000/- per acre and received Rs.1,70,000/- as earnest money thereunder? OPP
2. Whether the plaintiff always remained ready and willing and is still ready and willing to perform his part of the agreement of sale dated 06.04.1996? OPP
3. Whether the suit has not been properly valued for purpose of court fee and jurisdiction? OPD
4. Whether the suit land is coparcenary land. If so, its effect? OPD
5. Whether the plaintiff is entitled for specific performance

of the agreement of sale dated 06.04.1996? OPD

6. Whether the plaintiff is entitled for possession of the suit? OPD
7. Whether if issue No.4 is not proved, whether the plaintiff is entitled to recover Rs.3,40,000/- being refund of earnest money and damages? OPP
8. Whether the plaintiff is entitled for grant of permanent injunction as prayed for? OPP
9. Relief".

The plaintiff-respondent in order to prove his case examined PW2, deed writer, PW3 and PW4 who are the attesting witnesses to the agreement to sell to bring home the fact that a valid agreement had been executed. The appellant, on the other hand, examined DW1-Sewa Singh; Registration clerk, DW-2 Gurmit Singh, DW3-Palwinder Singh and he examined himself as DW4.

After perusing the evidence, the learned trial Court went on to decree the suit of the respondent-plaintiff which resulted in an appeal having been filed by the present appellant before the first appellate Court, and the findings of the trial Court were affirmed by the learned lower appellate Court.

Still dissatisfied the present appeal has been filed by the defendant-appellant.

It was contended by Sh.R.K.Handa, learned counsel for the appellant that the agreement to sell was a forged document and that there were money transactions between the appellant and the respondent and the blank papers signed by him were misused which has resulted in the present agreement to sell. He further contended that earlier a suit for permanent injunction was filed by the present respondent but that suit was

withdrawn with liberty to file a fresh suit and that option of filing a suit for specific performance was open to the respondent even at that point of time and since he has not availed of this remedy, he could not be permitted to raise a plea of specific performance in the subsequent suit and that the earlier suit would operate as res judicata.

Sh.G.S.Sandhawalia, learned counsel for the respondent, on the other hand, contended that both the Courts below have recorded a concurrent finding that the agreement to sell had been executed by the appellant. The findings regarding money transactions were not established. Therefore, the appellant could not escape from the liability to execute the sale deed in his favour.

I have heard learned counsel for the parties and have perused the record.

Both the Courts below have recorded a concurrent findings of fact upholding the validity of agreement to sell. The appellant could not show any cogent evidence that there were instances of money transactions between them which could lead to a conclusion that the agreement was forged. An attempt was made during the course of arguments by the learned counsel for the appellant to say that the market value of the land was much higher and he referred to the statement of the plaintiff-respondent to say that the value of the land was much higher than the stipulated price. The contention of the learned counsel for the appellant was that in view of this, an inference should have been drawn that the agreement was not a valid executed agreement. I am afraid that this contention of the learned counsel for the appellant cannot be accepted. The respondent has clearly stated that there are various rates prevailing in that area for different categories of land and the price fluctuates from as low as Rs.1.5 lacs to Rs.8 lacs and secondly, the inadequacy of the sale consideration can never be a ground to deny the specific performance of

an agreement.

In **K.Narinder vs. Riviera Apartments** 1999(Suppl.) CCC 528 (SC), Hon'ble the Supreme Court has held that inadequacy of consideration can never be a ground to constitute hardship on the defendant .Para 29 of the judgment is as follows:

Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so: the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.”

So, once as a matter of fact, it has been established that the agreement to sell was valid and not a result of fraud or mis-representation then an agreement to sell which is in writing nothing more can be read with except its contents. The plea of the appellant to say that the agreement cannot be enforced is unacceptable.

The next contention raised by the learned counsel for the appellant was that even the willingness of the respondent to perform his

part of the agreement is suspect, as the affidavit which has been placed on record as Exhibit P7 does not inspire confidence as there are over-writings in the said document. However, there is no evidence to substantiate the case of the appellant. Exhibit P7 is an affidavit which has been duly attested by the Executive Magistrate, Bholath and besides this, the respondent had also sent a legal notice Exhibit P1, acknowledgment of which is Exhibit P2 and the postal receipt P3 which shows that he was always willing and ready to perform his part of the agreement.

In view of this fact, no fault can be found in the findings of the Courts below because readiness and willingness of the plaintiff has to be in spirit and substance and not in letter i.e. in mathematical form.

In Abdul Khadar Rowther Vs.P.K. Sara Bai, AIR 1990 SC page 682, it has been held that it is the conduct of the plaintiff prior and subsequent to the filing of the suit which is to be taken into consideration and willingness and readiness to perform the agreement has to be pleaded specifically. The Apex Court observed that:-

“The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of the defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent upon the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at

any subsequent stage of the suit the plaintiff has taken those pleas.”

In a judgment of the Supreme Court reported as **1996 (1) Civil Court cases page 27** wherein the Supreme Court observed as follows:

To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may either infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.”

In Gulzar Singh Vs. Bara Singh, 2000(3) RCR (Civil) 458 it has been held that the conduct of the plaintiff also has to be taken into consideration.

In the instant case, there is no escape from the conclusion that the respondent was always ready and willing to perform his part of the agreement and it is only the appellant who has deviated from the performance of the agreement.

It was then contended by the learned counsel for the appellant that both the Courts below have gone wrong in not returning the finding on the issue of present suit being barred by the principle of res judicata under

the provisions of Order 2 Rule 2 CPC. In support of this contention, he relied upon a judgment of this Court reported as **Arjan Singh versus Babu Ram** 2002(1) PLR 587.

A perusal of the record shows that earlier suit was in fact filed prior to the last date fixed by the parties for the execution of the sale deed. The date chosen for execution of the sale deed was 10.07.1996 whereas the suit was filed on 17.05.1996. Thereafter, the suit was withdrawn on 28.08.1996 and the present suit was filed on 10.08.1996. The earlier suit for permanent injunction was filed before 10.07.1996 which was the date for execution of the sale deed. On that date, the right to specifically enforce the agreement had not come into existence as it was only after 10.07.1996 that this right would have accrued to the respondent. Hence, it cannot be said that the suit is barred by principle of res judicata.

Apart from this, no issue was claimed by the appellant on the above question.

In view of this, there is no infirmity in Courts below having not answered this question as it was never pressed before the Courts below. In a suit for specific performance, the essential ingredients are that there should be an existence of valid sale agreement which should be proved and that the plaintiff should be willing and ready to perform his part of the agreement throughout.

Both the Courts below have recorded a consistent finding that there was a valid agreement executed by the appellant in favour of the respondent and further that the respondent was always willing and ready to perform his part of the agreement.

There is, thus, no infirmity in the findings recorded by the Courts below. No substantial question of law has been shown to have

arisen in the present appeal and it is devoid of any merit and is dismissed
as such.

August 28, 2006
Seema

(MAHESH GROVER)
JUDGE

